

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

LORI MARIE WEBB,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of the Social Security  
Administration,

Defendant.

CASE NO. 3:15-cv-05098 JRC

ORDER ON PLAINTIFF'S  
COMPLAINT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States Magistrate Judge, Dkt. 4). This matter has been fully briefed (*see* Dkt. 16, 20, 23).

After considering and reviewing the record, the Court concludes that the ALJ erroneously dismissed the opinion of evaluating psychologist Kimberly Wheeler, Ph.D. The case must be reversed and remanded for further proceedings.

## BACKGROUND

Plaintiff, LORI MARIE WEBB, was born in 1962 and was 43 years old on the alleged date of disability onset of January 1, 2006 (*see* AR. 188-94). Plaintiff graduated from high school and attended one year of college (AR. 802). Plaintiff has past work experience as a bartender, and residential and commercial painter (AR. 64-66). Plaintiff's last employment was a part-time job handing out samples at a warehouse store, but stopped working when she fractured her hip (AR. 49).

According to the ALJ, plaintiff has at least the severe impairments of "Morbid Obesity; Degenerative Joint Disease of the Bilateral Hips, status post Left Total Hip Replacement; Asthma/COPD; Back Problems, Alcoholism; Depression; Anxiety; PTSD; and Borderline Personality Disorder (20 CFR 416.920(c))" (AR. 21).

At the time of the hearing, plaintiff lived in a recreational vehicle on her father's property (AR. 277, 285).

## PROCEDURAL HISTORY

Plaintiff's application for Supplemental Security Income ("SSI") benefits pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act was denied initially and following reconsideration (*see* AR. 82-93, 95-109). Plaintiff's requested hearing was held before Administrative Law Judge John Rohlf ("the ALJ") on July 9, 2013 (*see* AR. 43-80). On August 8, 2013, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see* AR. 16-38).

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) Whether or not the ALJ provided sufficient reasons to reject the opinion of treating physician Robert

1 Peterson, M.D., that plaintiff was limited to sedentary work; (2) Whether or not the ALJ  
2 provided sufficient reasons to reject the opinion of Dr. Wheeler; and (3) Whether or not  
3 given these errors the residual functional capacity (“RFC”) and hypothetical questions  
4 were complete such that the step five finding had support in substantial evidence (*see*  
5 Dkt. 16, p. 1).

#### 6 STANDARD OF REVIEW

7 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
8 denial of social security benefits if the ALJ's findings are based on legal error or not  
9 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d  
10 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.  
11 1999)).  
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#### 13 DISCUSSION

14 (1) Whether or not the ALJ provided sufficient reasons to reject the opinion of  
15 treating physician Robert Peterson, M.D., that plaintiff was limited to  
16 sedentary work.

17 Dr. Robert Peterson treated plaintiff for her physical impairments. He completed a  
18 physical functional evaluation form in September 2012 (AR. 808-10). He listed  
19 plaintiff's chief complaints as moderate bilateral hip pain, moderate chronic back pain,  
20 severe depression, and severe asthma (AR. 808-09). He considered her mental health to  
21 be a major disabling problem (AR. 810). He rated plaintiff as capable of performing  
22 sedentary work with limitations persisting for three months (AR. 810).

23 Despite Dr. Peterson's role as a treating physician, the ALJ gave his opinion only  
24 “some” weight (AR. 29). The ALJ reached this conclusion because Dr. Peterson's

1 contemporaneous medical notes show normal range of motion in her neck, hips, back,  
2 hands, and fingers, and no audible wheezing (AR. 29). Additionally, the ALJ noted that  
3 Dr. Peterson opined that plaintiff's limitations would only persist for three months and  
4 that it was unclear whether the doctor's definition of disability was the same as that used  
5 by the Social Security Administration (AR. 29). The ALJ also found that Dr. Peterson  
6 did not give "an in depth explanation for his opinion." (AR. 29).

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8 Plaintiff contends the ALJ erred by rejecting this treating physician evaluation  
9 which established that plaintiff could only perform sedentary work, and if properly  
10 credited, this opinion limiting plaintiff to sedentary work would require a finding of  
11 disabled as of her fiftieth birthday based on the Medical Vocational Guidelines (Dkt. 16,  
12 p. 7-8). The defendant argues that the ALJ properly assessed Dr. Peterson's opinion  
13 because of the limited three month duration, the determination of disability is reserved to  
14 the Commissioner, the conclusions in the evaluation were inconsistent with other  
15 evidence in the record including contemporaneous notes, and the opinion was  
16 inconsistent with the reviewing physician's opinion (Dkt. 20, p. 7).

17 Regardless of whether Dr. Peterson's assessment was supported by sufficient,  
18 consistent evidence to establish plaintiff as limited to sedentary work, the ALJ did not err  
19 in rejecting this opinion. Dr. Peterson opined that plaintiff's limitations would persist at  
20 the sedentary level for only three months (AR. 810). This short duration falls far short of  
21 the required twelve month period of impairment necessary to establish disability. *See* 20  
22 C.F.R. §§ 416.905(a), 416.912(a) and (c). Because the opined limitations are only  
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1 expected to last three months, Dr. Peterson's assessment is not relevant to establishing  
2 disability. Therefore, the ALJ did not err by limiting the weight assigned to this opinion.

3 (2) Whether or not the ALJ provided sufficient reasons to reject the opinion of  
4 Dr. Wheeler.

5 Kimberly Wheeler, Ph.D. evaluated plaintiff in September 2012 (AR. 802-06).  
6 She was an examining psychologist and, therefore, the ALJ must provide "specific and  
7 legitimate reasons that are supported by substantial evidence in the record" in order to  
8 reject her contradicted opinion. *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996).  
9 Dr. Wheeler diagnosed depression NOS, PTSD, borderline personality disorder, and  
10 alcohol dependence in tentative early remission (AR. 803). She observed plaintiff's  
11 incessant speech, hyperstartle, negative-self image, overreaction to anger, and depression  
12 (AR. 803). Dr. Wheeler also rated plaintiff as markedly impaired in her ability to adapt  
13 to changes in a routine work setting and communicate and perform effectively in a work  
14 setting (AR. 804). Plaintiff was also severely impaired in her ability to complete a  
15 normal work day/week without interruptions from her psychological symptoms and  
16 maintain appropriate behavior in a work environment (AR. 804). According to Dr.  
17 Wheeler, plaintiff's current impairments were not primarily the result of alcohol or drug  
18 use within the past sixty days and would persist following sixty days of sobriety (AR.  
19 805). The ALJ gave little weight to this opinion because it did not reflect plaintiff's  
20 functioning with appropriate treatment and indicated that chemical dependency  
21 assessment/treatment was not recommended despite plaintiff's tentative sobriety and  
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1 relapse (AR. 29). The ALJ also assigned less weight to Dr. Wheeler's opinion as a one-  
2 time examination based on claimant's own report of functioning (AR. 29).

3       The ALJ's decision to disregard Dr. Wheeler's opinion as a one-time evaluation  
4 reliant on plaintiff's subjective complaints was erroneous. This reasoning was  
5 particularly inappropriate due to the great weight given to the opinions of reviewing  
6 psychologists Drs. Robinson and Regets (AR. 29). Even with only one evaluation, Dr.  
7 Wheeler was an examining psychologist and entitled to greater weight than the two  
8 nonexamining agency psychologists who merely reviewed the record. *See Lester, supra*,  
9 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. § 404.1527(c)(1). While an ALJ  
10 may rely on opinions of reviewing psychologists over the opinion of an examining  
11 psychologist in some circumstances, there are good reasons why the ALJ should not have  
12 done so here.

14       It should be noted that Dr. Wheeler did not over-rely on plaintiff's self-reports.  
15 According to the Ninth Circuit, "[an] ALJ may reject a treating physician's opinion if it is  
16 based 'to a large extent' on a claimant self-reports that have been properly discounted as  
17 incredible." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008) (*quoting Morgan*  
18 *v. Comm'r Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999) (*citing Fair v. Bowen*,  
19 885 F.2d 597, 605(9th Cir. 1989))). This situation is distinguishable from one in which  
20 the doctor provides his own observations in support of his assessments and opinions. *See*  
21 *Ryan v. Comm'r of Soc. Sec. Admin.*, 528 F.3d 1194, 1199-1200 (9th Cir. 2008) ("an ALJ  
22 does not provide clear and convincing reasons for rejecting an examining physician's  
23 opinion by questioning the credibility of the patient's complaints where the doctor does  
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1 not discredit those complaints and supports his ultimate opinion with his own  
2 observations”); *see also Edlund v. Massanari, supra*, 253 F.3d 1152, 1159 (9th Cir.  
3 2001). According to the Ninth Circuit, “when an opinion is not more heavily based on a  
4 patient’s self-reports than on clinical observations, there is no evidentiary basis for  
5 rejecting the opinion.” *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014) (*citing*  
6 *Ryan, supra*, 528 F.3d at 1199-1200).

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8 Here, Dr. Wheeler made clinical observations and conducted a mental status  
9 examination rather than merely relying on plaintiff’s self-reports. She observed incessant  
10 speech and rapid shifting between topics (AR. 803). She also noted that plaintiff was a  
11 poor listener and missed directions repeatedly (AR. 803). Plaintiff had hyperstartle reflex  
12 and berated herself for the reaction (AR. 803). And, Dr. Wheeler reported that plaintiff  
13 had a negative self-image, beating herself up “in a way that others would find baiting and  
14 abrasive.” (AR. 803). Plaintiff was easily slighted, frequently misinterpreting statements  
15 as a slight and quickly becoming defensive (AR. 803). During the mental status  
16 examination, Dr. Wheeler found that plaintiff’s thought process and content were not  
17 normal, they were “organized and goal directed, though the only goal is to beat herself  
18 up.” (AR. 805). Plaintiff had poor memory, concentration, insight, and judgment (AR.  
19 806). These findings were based on observations made by a trained psychologist, rather  
20 than parroting of symptoms described by the plaintiff. Therefore, the ALJ erred by  
21 disregarding Dr. Wheeler’s opinion as based on plaintiff’s own report of functioning.  
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23 Additionally, the ALJ faulted Dr. Wheeler’s opinion because it did not reflect  
24 plaintiff’s functioning with appropriate treatment and indicated that chemical dependency

1 assessment or treatment was not recommended (AR. 29). Dr. Wheeler found that  
2 plaintiff's impairments were not primarily the result of drug or alcohol use in the past  
3 sixty days and would persist even after sobriety (AR. 805). These statements imply that  
4 drug and alcohol addiction is not the root of the underlying impairments and sobriety  
5 would not necessarily improve plaintiff's condition. Her opinion was supported by  
6 observations of daily, marked depression which "may change with abstinence from  
7 alcohol, though such a deeply ingrained cognitive habit, might not." (AR. 803). Instead,  
8 Dr. Wheeler recommended mental health treatment (AR. 805). This assessment was not  
9 inconsistent with observations and opinion that plaintiff's impairments would persist  
10 despite sobriety and mental health treatment was necessary.  
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12 Finally, the ALJ gave little weight to this opinion because Dr. Wheeler did not  
13 assess plaintiff's functioning with appropriate treatment (AR. 29). However, *none* of the  
14 opinions in the record reflect plaintiff's condition with treatment, including the opinions  
15 from the consulting psychologists (AR. 29, 86-87, 90-91, 100-01, 105-06). Reviewing  
16 psychologists Drs. Robinson and Regets examined plaintiff's records prior to Dr.  
17 Wheeler's evaluation and before plaintiff began mental health treatment (AR. 86-87, 100-  
18 01). Yet, the ALJ gave great weight to these non-examining psychologists whose  
19 opinions also failed to reflect plaintiff's capacity with treatment. The ALJ's rejection of  
20 Dr. Wheeler's opinion for a flaw present in *all* the psychological assessments in the  
21 record, including those given great weight, was not legitimate.  
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23 Dr. Wheeler provided a consistent opinion based on her observations and clinical  
24 findings. The ALJ gave little weight to this opinion, relying instead on opinions from



1 consulting physicians who reviewed plaintiff's medical records prior to Dr. Wheeler's  
2 evaluation. The ALJ's reasons for rejecting the opinion were not specific, legitimate, or  
3 supported by substantial evidence in the record and, therefore, constitute error.

4 The Ninth Circuit has "recognized that harmless error principles apply in the  
5 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
6 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th  
7 Cir. 2006) (collecting cases)). Recently the Ninth Circuit reaffirmed the explanation in  
8 *Stout* that "ALJ errors in social security are harmless if they are 'inconsequential to the  
9 ultimate nondisability determination' and that 'a reviewing court cannot consider [an]  
10 error harmless unless it can confidently conclude that no reasonable ALJ, when fully  
11 crediting the testimony, could have reached a different disability determination.'" *Marsh*  
12 *v. Colvin*, 792 F.3d 1170, 2015 U.S. App. LEXIS 11920 at \*7-\*8 (9th Cir. July 10, 2015)  
13 (citing *Stout*, 454 F.3d at 1055-56). The court further indicated that "the more serious the  
14 ALJ's error, the more difficult it should be to show the error was harmless." *Id.* at \*9  
15 (noting that where the ALJ did not even mention a doctor's opinion that plaintiff was  
16 "pretty much nonfunctional," it could not "confidently conclude" that the error was  
17 harmless) (citing *Stout*, 454 F.3d at 1056; *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742,  
18 750 (6th Cir. 2007)). Even though "the district court gave persuasive reasons to  
19 determine harmlessness," the Ninth Circuit reversed and remanded for further  
20 administrative proceedings, noting that "the decision on disability rests with the ALJ and  
21 the Commissioner of the Social Security Administration in the first instance, not with a  
22 district court." *Id.* (citing 20 C.F.R. § 404.1527(d)(1)-(3)).  
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1 In this case, the Court concludes that the ALJ's error was harmful because  
2 plaintiff's RFC may not account for all of her impairments. According to the Ninth  
3 Circuit, when an ALJ ignores or improperly discounts significant and probative evidence  
4 in the record favorable to a claimant's position, such as an opinion from an examining or  
5 treating doctor, the ALJ "thereby provide[s] an incomplete residual functional capacity  
6 [RFC] determination." *See Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).  
7 Furthermore, when the RFC is incomplete, the hypothetical question presented to the  
8 vocational expert relied on at step five necessarily also is incomplete, "and therefore the  
9 ALJ's reliance on the vocational expert's answers [is] improper." *See id.* at 1162. Here,  
10 the ALJ improperly discounted Dr. Wheeler's opinion as to plaintiff's mental health  
11 impairments and their limitations. Therefore, the resulting RFC is incomplete and the  
12 subsequent vocational expert testimony is unreliable. Reversal is required.

14 Generally when the Social Security Administration does not determine a  
15 claimant's application properly, "the proper course, except in rare circumstances, is to  
16 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,  
17 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put  
18 forth a "test for determining when [improperly rejected] evidence should be credited and  
19 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th  
20 Cir. 2000) (*quoting Smolen*, 80 F.3d at 1292). It is appropriate when:

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22 (1) the ALJ has failed to provide legally sufficient reasons for rejecting  
23 such evidence, (2) there are no outstanding issues that must be resolved  
24 before a determination of disability can be made, and (3) it is clear from  
the record that the ALJ would be required to find the claimant disabled  
were such evidence credited.

1 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292)).

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3 Plaintiff argues for remand for benefits because the record is complete and if  
4 Dr. Wheeler's opinion were credited it would establish an inability to sustain  
5 employment (Dkt. 16, p. 11-12). The Court disagrees. Outstanding issues must be  
6 resolved. *See Smolen, supra*, 80 F.3d at 1292.

7 The ALJ's improper evaluation of Dr. Wheeler's opinion led to an RFC  
8 which may not have adequately accounted for the full extent of plaintiff's mental  
9 impairments. It is not the Court's role to interpret the evidence and determine  
10 plaintiff's RFC. The final responsibility for deciding issues such as an individual's  
11 RFC is reserved to the Commissioner. Social Security Ruling (SSR) 96-5P. As a  
12 result, further proceedings are necessary to reevaluate Dr. Wheeler's opinion,  
13 formulate a new RFC if required, and complete steps four and five of the disability  
14 analysis as needed.

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16 Even if Dr. Wheeler's testimony established an inability to sustain  
17 employment which translated to disability, further proceedings would be necessary.  
18 Evidence in the record shows a significant history of substance abuse, which could  
19 result in ineligibility for benefits if the substance abuse is a contributing factor to  
20 plaintiff's disability. 42 U.S.C. §§423(d)(2)(C), 1382c(a)(3)(J); *Bustamante v.*  
21 *Massanari*, 262 F.3d 949, 954 (2001). An initial determination that plaintiff was  
22 disabled would necessitate the ALJ conduct a second five-step inquiry to determine  
23 if the claimant would still be disabled in the absence of substance abuse.

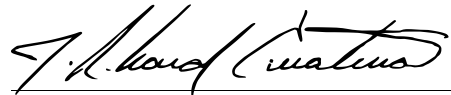
1 *Bustamante, supra*, 262 F.3d at 954. Therefore, remand for immediate award of  
2 benefits is not appropriate in this case. Outstanding issues remain and further  
3 proceedings are necessary.

4 CONCLUSION

5 Based on these reasons and the relevant record, the Court **ORDERS** that this  
6 matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §  
7 405(g) to the Acting Commissioner for further consideration consistent with this order.

8 **JUDGMENT** should be for plaintiff and the case should be closed.

9 Dated this 2nd day of November, 2015.

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12 J. Richard Creatura  
13 United States Magistrate Judge  
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